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The Superior Court of Lang County, California, has three judges. One presides and handles administrative duties. Another hears virtually all of the criminal matters pending in the court. The third considers himself a specialist in civil matters. The latter, whom we shall call Judge Friend, automatically hears the law and motion calendar of the court each Friday. Occasionally, of course, the other two judges, Presiding Judge Curet and Criminal Judge Painter, hear civil matters, but this is not their usual assignment.

The court is located in the county seat, a city of fifteen thousand. Of the fifty-two lawyers in the county, one law firm handles a majority of the matters in the court.

In July, 1968, a resident of Texas filed an action for a permanent injunction against a savings and loan association, seeking to restrain the defendant from proceeding with its then pending non-judicial foreclosure. The action was filed by Don Rumm, plaintiff's Los Angeles attorney, in association with Jim Wolf, a senior partner of that most active law firm in the county.

Two months later, after the filing of affidavits both *pro* and *con*, the plaintiff's motion for a preliminary injunction was heard by Judge Friend. The defendant appeared by its Los Angeles counsel, Ronald Scott. After considerable argument, Judge Friend issued a preliminary injunction.

For the next year, various motions were made by the defendant through its Los Angeles counsel, among which were motions to dissolve and/or modify the preliminary injunction, change venue, advance and specially set for trial. All were heard by Judge Friend and all were denied.

After having eight (8) motions in succession denied, and believing that at least some were good on their face, Scott detected a strong odor of seafood, and determined that it was now necessary to associate local counsel. He therefore telephoned Walter Thomas, a former president of the Lang County Bar Association, and invited Thomas to join in representing the defendant. Before accepting, Thomas requested some information on the nature and status of the case. Scott gave Thomas all the information he requested, including the names of counsel representing the plaintiff.

Thomas, asked, "Are you aware that prior to assuming the bench, Judge Friend was the law partner of Jim Wolf?"

Scott replied that he had no knowledge of that fact; and that he was shocked that Judge Friend had not disclosed that information. The odor which Scott had previously detected was now considerably more distinct. And two weeks later, it became overwhelming.

Over cocktails, Scott was discussing the matter with an attorney from San Francisco. Through this conversation, Scott discovered that prior to his appointment, Judge Friend had been a trial associate of plaintiff's other counsel, Mr. Rumm, on numerous matters.

A pretrial conference was then pending and scheduled to be heard by Judge Friend. Scott immediately filed a declaration of prejudice pursuant to Code of Civil Procedure, § 170.6 to disqualify Judge Friend from sitting in any further matter relating to the case.

Four days before the date set for the pretrial conference, Rumm and Wolf filed a motion to strike the declaration of prejudice. Judge Friend himself signed the order shortening time for service.

Four days later Judge Curet heard and granted the motion to strike the declaration of prejudice, on the ground that Judge Friend had already heard the motion for preliminary injunction; and that therefore the declaration of prejudice had not been timely filed.

Every motion from that point on was scheduled before Judge Friend. Each time Scott and Thomas filed declarations of prejudice. Each was rebuffed by Judge Friend. But at no time did Judge Friend or Rumm or Wolf acknowledge the judge's former associations.

Three questions of law are presented by these facts:

1. Whether in view of the provisions of Code of Civil Procedure, § 170.6, a judge has a duty to inform all counsel of any prior relationship of his to any party or counsel prior to hearing contested issues of fact;
2. Whether, upon discovery of a judge's concealment of his prior relationship with counsel for one side, the opposing party is entitled to disqualify the judge under Code of Civil Procedure, § 170.6; and
3. Whether a hearing on a motion for preliminary injunction involves "a determination of contested fact issues relating to the merits" which precludes the later filing of a declaration of disqualification under Code of Civil Procedure, § 170.6.

Novelty and Importance of the Question

In 1946, the Honorable Robert Jackson, Associate Justice of the Supreme Court of the United States, then on leave of absence for special duty at the Nuremberg trials, accused the Honorable Hugo Black, then and now an Associate Justice of the Court, of involvement in a conflict of interest and of improperly participating in the decision of *Jewell Ridge Coal Corporation v. Local No. 6167*, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945). Justice Jackson argued that Justice Black's former partnership with one of the attorneys representing a party in the matter should have immediately disqualified him, even though his association had ended almost twenty (20) years before (in 1926), when Justice Black was elected a United States Senator. Justice Jackson's premise (which was not adopted) was that the fact of past association, no matter how distant, is, in and of itself, grounds for disqualification, the primary criterion being preservation of not only the actuality but the appearance of judicial impartiality. The controversy created headlines. (See *New York Times*, June 11, 1946, page 2).

In the *Jewell Ridge* episode, all parties knew of Justice Black's former partnership. What should happen, however, in the case where a judge, knowing that a former partner and a former trial associate will be appearing before him and further knowing that the opposing parties and counsel are unaware of the former relationships, fails to disclose those facts, thereby precluding the opposing party from utilizing his essentially peremptory right to disqualify?

The nature and extent of the past relationships, and whether the judge was or is impartial, and whether the judge should disqualify himself, are all immaterial. Code of Civil Procedure §170.6 is a statute designed to guarantee the appearance of fairness to litigants in California courts. Can the appearance of fairness be maintained if a litigant is precluded from exercising his right under the statute because of a judge's failure to disclose material facts?

At stake is the integrity, and therefore the efficacy, of our system of administration of justice. The judiciary bears the primary responsibility of preserving the integrity of our system, and the respect it must command in order to fulfill its function. The issue is most timely. (Witness the furore over the Carswell and Haynsworth nominations, leading to the promulgation of conflict-of-interest rules for the judiciary by the committee chaired by former Chief Justice of California Roger Traynor,

and the introduction in the United States Senate of The Judicial Reform Act, S. 1506-1516, 91st Cong., 1st Sess. (1969).)

The questions therefore squarely posed are as follows: (1) Is the fact that a judge has failed to disclose his former association with counsel for one side grounds for a challenge based upon the provisions of Code of Civil Procedure § 170.6? (2) If so, when is such a challenge timely made?

I

Justice Must Not Only Be Done; It Must Appear To Be Done.

Courts worldwide have held that a judge must not only be unbiased but appear unbiased. For example, in *U'ren v. Bagley,* 118 Ore. 77, 82, 245 P. 1074, 1075 (1926), the court stated:

> "Courts, like Caesar's wife, must be not only virtuous but above suspicion."

The California Supreme Court, in *Johnson v. Superior Court,* 50 Cal. 2d 693, 697, 329 P.2d 5 (1958), said:

> "It is important, of course, not only that the integrity and fairness of the judiciary be maintained, but also that the business of the courts be conducted in such a manner as will avoid suspicion."

(See also *Rosenfield v. Vosper,* 45 Cal. App. 2d 365, 114 P.2d 29 (1941); *Rex v. Sussex Justices,* 1 K.B. 256, 93 L.J.K.B. 129 (1924); *Dotson v. Burchett,* 301 Ky. 28, 190 S.W.2d 697, 162 A.L.R. 636 (1945); and 75 Harv. L.R. 1660 (1961) discussing 28 U.S.C. §144.)

II

Despite a Lack of Direct Authority All Analogous Precedent Requires Disclosure.

The paucity of precedent apparently arises, in large part, from the fact that most judges habitually disclose past associations at the outset of an action. No court has decided a case involving such a challenge to a judge. (Frank, *Disqualification of Judges,* 56 Yale L.J. 605 (1947).) However, in *Commonwealth Coatings Corporation v. Continental Casualty Company,* 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1968), in review of an arbitrators' decision, it was held that the award must be set aside because one of the arbitrators had failed to disclose his prior business dealings with a litigant, which facts were not discovered until after the hearings on arbitration ended and the award had been made.

Justice Black delivered the opinion of the court. At 393 U.S. 147, he stated:

> "It is true that petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives. But neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years. *We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge.*" (Emphasis supplied)

In the case of courts, Justice Black said, it is a constitutional principle that a judge may not be biased or partial.

California follows the *Commonwealth* reasoning. In *Johnston v. Security Insurance Company,* 6 Cal. App. 3d 839, 86 Cal. Rptr. 133 (1970), one of the parties to arbitration discovered after the award that a supposedly neutral arbitrator had in fact been previously associated with the claimant's counsel and with the claimant's appraiser. The court held, at page 843:

> ". . . The fact that no actual fraud or bias was charged or proved against the neutral umpire is immaterial. We do not intend by our decision to imply any actual wrong dealings by [the appraiser, the "neutral" umpire], or by claimants' counsel. Nevertheless, [the umpire] was under a legal duty to 'disclose to the parties any dealings that might create an impression of possible bias' at the outset of the hearings."

Judge Friend's position is almost identical to that of the arbitrators in *Commonwealth* and in *Johnston.* His failure to disclose his previous relationship with Rumm and Wolf creates the "impression of bias" and (even if such relationship would not in and of itself be grounds for his disqualification) must constitute the basis for a challenge under Code of Civil Procedure §170.6, having been timely made once the facts were ascertained.

III

The Standard of Disclosure Required of a Judge Must Be At Least Equal to That Required of a Juror.

The general rule in California and throughout the country is that no verdict can be impeached by an affidavit of a juror. However, one of the exceptions to the rule is directly analogous to the issue here. That exception is court-made and permits a juror to testify about occurrences during the trial or deliberations which disclose a juror's bias existing at the time of the *voir dire* examination which, if truthfully declared in answer to questions actually put on *voir dire,* would have been the basis for a challenge for cause, but which was concealed by untruthful answers and could not have been detected before the end of the trial by the party prejudiced. (A case that collects and discusses most of the California precedents on this subject is *Shipley v. Permanente Hospital,* 127 Cal. App. 2d 417, 274 P.2d 53 (1954).)

The policy underlying the exception to the rule regarding jurors is the same as the policy expressed in Code of Civil Procedure 170.6: litigants' belief in impartiality, leading as it does to respect for the legal process, requires that a litigant be given an opportunity to invoke his right to challenge, either peremptorily or for cause, those whom he believes or fears may not be impartial.

Similarly, it is unnecessary that concealment of the facts which might or would give rise to the challenge be intentional or deliberate. It is the failure to disclose, not the reason for concealment, that is determinative.

Another important similarity is the fact that whether or not the party kept in ignorance would have raised the challenge is not dispositive. Depriving him of the opportunity to make that choice is enough.

It is scarcely necessary to comment that a judge should have an even higher duty than a juror with regard to disclosure of facts which might give rise to a challenge against his impartiality, and a declaration for disqualification. There is no statutory provision which permits *voir dire* examination of a judge. Therefore, it should be mandatory that a judge disclose any facts which might reasonably prompt a litigant to exercise his rights under Code of Civil Procedure § 170.6. Any lesser standard would constitute an implicit denigration of the entire system of justice under which we operate.

IV

A Judge Must Be Held to a Standard of Disclosure at Least Equal to That Required of an Attorney Who Represents Two Clients With Conflicting Interests.

The case of *Lysick v. Walcom,* 258 Cal. App. 2d 136, 147, 65 Cal. Rptr. 406 (1968), discusses the responsibility owed by an attorney to his dual clients under the Rules of Professional Conduct. It requires that the attorney "disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation."

Just as a client has the right to demand that his attorney fully disclose

any conflicting interest, so, too, a litigant has a right to expect that a judge who determines the issues in his cause will fully disclose any facts which show bias or prejudice, including prior associations with a litigant or his counsel.

If a client is entitled to make a decision as to the retention of a lawyer having a conflict of interests, so too should a litigant be entitled to make a free and intelligent decision whether to invoke the provisions of Code of Civil Procedure § 170.6, after a full and complete disclosure by the judge of all facts and circumstances which would enable such litigant to make a free and intelligent decision.

To deny a litigant knowledge of facts and circumstances upon which to base an intelligent decision is to deny him the power to exercise his rights under Code of Civil Procedure § 170.6.

V

The Right to Disqualify Under Code of Civil Procedure §170.6 Is Unconditional, and Cannot Be Waived or Lost Due to Concealment of the Facts That Would Have Caused Its Invocation

Immediately after learning of Judge Friend's former associations, Scott and Thomas filed the declaration of prejudice required under Code of Civil Procedure § 170.6. Judge Friend had previously issued a preliminary injunction. Judge Curet ordered the declaration stricken on the grounds that since Judge Friend had previously presided at the hearing for the preliminary injunction, subsequent filing of the declaration under Code of Civil Procedure §170.6 was untimely.

Such blind allegiance to the literal wording of a code section has been taken to task in numerous cases and treatises. For example, in 79 Harvard Law Review, 1435 at 1444 (1966), the editors state:

> "Whatever deadline is set, some affiants will have 'good cause' for filing late. Discovery, after the deadline, of facts indicating the judge's bias presently constitutes good cause for late filing."

(See also *Hurd v. Letts*, 152 F.2d 121 (U.S.C.A. D.C. 1945) and *Hendrickson v. Superior Court*, 85 Ariz. 10, 330 P.2d 507 (1958), noted in 1 Ariz. L.R. 167 (1959).)

The right to disqualify is essentially peremptory. (*Oak Grove School District v. City Title Ins. Co.*, 217 Cal. App. 2d 678, 703, 32 Cal. Rptr. 288 (1963). Code of Civil Procedure § 170.6, unlike Code of Civil Procedure §170, does not require a statement of any facts upon which the moving party seeks to disqualify a judge for bias and prejudice. All that is required is a statement that the party or his attorney *believes* that he cannot have a fair and impartial trial or hearing.

In *Johnson v. Superior Court, supra,* at page 697, the California Supreme Court held Code of Civil Procedure §170.6 to be constitutional. In fact, subparagraph (5) of the section specifies the form to be filed thereunder:

> ".....", being first duly sworn, deposes and says: That he is a party (or attorney for a party) to the within action (or special proceeding). That ..... the judge or court commissioner before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against the party (or his attorney) or the interest of the party (or his attorney) so that affiant cannot *or believes that he cannot* have a fair and impartial trial or hearing before such judge or court commissioner." (Emphasis supplied)

Therefore, the question of timeliness under Code of Civil Procedure, § 170.6 can be decided only in the context of the state of the defendant's knowledge of the relevant facts. It is both impractical and impossible to require a party to file an affidavit of prejudice against a judge when that judge (or opposing counsel) fails to disclose facts which would have prompted the defendant to file such an affidavit, and when the defendant had no independent knowledge of, and no reason to question any third party concerning, the judge's former associations.

VI

A Ruling on a Motion for a Preliminary Injunction Does Not Preclude Filing an Affidavit of Prejudice Under Code of Civil Procedure §170.6

In *Kohn v. Superior Court*, 239 Cal. App. 2d 428, 430, 48 Cal. Rptr. 832 (1966), the court stated:

> ". . . it is crystal clear . . . that a motion to disqualify a judge [under section 170.6] can now be made after any hearing or proceeding held prior to trial which does not involve a determination of a contested fact issue relating to the merits."

The court in *Kohn* concluded that a motion to disqualify after a determination of probable cause under *Penal Code* §995 is timely and is, as a matter of law, made before a determination of the factual issues relating to the merits of the case.

However, as pure *obiter dictum* having no relation to the holding of the case, the court, at page 430, stated:

> "A typical example of a preliminary proceeding which involves a determination of fact issues relating to the merits would be a hearing on a motion for a preliminary injunction where the judge actually weighs evidence and resolves conflicts (*Voeltz v. Bakery etc. Union*, 40 Cal. 2d 382, 386 [254 P.2d 553])."

The court's reliance on *Voeltz* is misplaced. *Voeltz* neither expressly nor impliedly says that. As a matter of fact, the court in *Voeltz* acknowledged its inability to make a determination relating to the merits, or resolve conflicts, with the result that the court issued the preliminary injunction so as to maintain the status quo.

The issuance of a preliminary injunction does not result from the resolution of conflicts and weighing evidence *relating to the merits* which might preclude a challenge thereafter under Code of Civil Procedure § 170.6. The point is succinctly made in *Anderson v. Joseph*, 146 Cal. App. 2d 450, 303 P.2d 1053 (1956), where the court stated (p. 454):

> ". . . unless based upon stipulation or other satisfactory showings submitting the cause on the merits, the court was without jurisdiction to determine the merits upon the hearing of a motion for a temporary injunction and the orders purporting to do so are void."

CONCLUSION

The fact of Judge Friend's former partnership with Mr. Wolf and his former association with Mr. Rumm does not *ipso facto* disqualify him from hearing a matter presented by those gentlemen. Such a situation was presented to the American Bar Association's Standing Committee on Professional Ethics in October of 1962. In its informal opinion number 594, the Committee stated that there was no canon of judicial ethics directly requiring an Associate Justice of the Supreme Court of Arkansas to disqualify himself from sitting in cases in which a party was represented by the law firm of which he was a former member, particularly after the lapse of several years from the date of enrobing. The Committee concluded: "In the final analysis it must be left to the good judgment and conscience of the individual judge."

But the point of view expressed by the Committee presupposes that all parties know of the former association prior to the judge's sitting in the case. It is an entirely different matter for a judge to hear a case where he and his former associates have failed to disclose such an association to opposing counsel. The right granted by Code of Civil Procedure § 170.6 cannot be held to be waived until a party is actually or constructively in possession of sufficient information for him to intelligently make a choice as to whether the judge should try his case.

There must be no imputation of intentional wrongdoing on the part of Judge Friend. But a presumption of good intentions does not resolve this important question.

It is clear that the reason behind the peremptory challenge authorized by Code of Civil Procedure § 170.6 is to avoid the *appearance* of bias, so as to serve the greater purpose of protecting the integrity of and respect for the judiciary, and therefore the legal process. Lack of precedent arises mainly from the unpublished but pervasive practice of voluntary disclosure of possible grounds for disqualification. However, an appellate court will one day be called on to deal with this important question. Its answer will be enlightening to the bench and bar alike.

COMMITTEE ACTIVITIES

The Functions of the Ethics and Arbitration Committee

Few members seem to be aware of the existence or the functions of the Ethics and Arbitration Committee of the Beverly Hills Bar Association.

The Committee is charged with considering "inquiries from members regarding matters of professional conduct or ethics" and assisting "in resolving complaints or disputes between members or between clients and members" and "to serve as arbitrators where disputants agree."

The Committee provides an arbitration service where there is a fee dispute, either between two or more attorneys or between attorneys and clients. Under its rules, the Committee cannot accept any other disputes for arbitration, unless the dispute is referred to it by the Board of Governors of the Association. As in other arbitration proceedings, the Committee cannot provide arbitrators for a dispute without the agreement of the parties to the dispute.

At the request of a member of the Association, the Committee will render a written opinion regarding matters of professional conduct or ethics. Needless to say, such an opinion will be advisory only.

The Committee recently adopted comprehensive rules covering the selection of arbitrators and the conduct of arbitration proceedings. A copy of the Rules can be obtained by request from the Association offices. Any arbitration proceeding before the Committee will result in written findings and a decision.

The arbitration functions of the Committee are recommended in matters involving fee disputes for several reasons. First, it is good public relations for attorneys who become involved in fee disputes with their clients to submit the dispute to arbitration. This provides both parties with a convenient, inexpensive and relatively informal forum for the resolution of the dispute. Second, the disputants are afforded a forum in which they can obtain a rapid decision when compared to the time consumed in the courts. And third, if need be, the decision can be reduced to a judgment (CCP § 1285, *et seq.*).

Next time you wonder about your ethical position if you take some action, or some client objects to or refuses to pay your bill because he contends it is too high, we recommend to you the services of your Ethics and Arbitration Committee.

NORMAN D. ROSE
Chairman, Ethics and
Arbitration Committee BHBA